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No. 82-195

IN THE

Supreme Court of the United States

October Term, 1982

VAN D. MUELLER AND JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN, AND DOROTHY DEHAAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN AND DOROTHY DEHAAN.

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota statute, which grants a taxpayer a deduction on his state tax return, up to a certain maximum, for amounts he has paid to others for tuition, textbooks and transportation for dependents attending a qualified elementary or secondary school, either public or nonpublic, in any way violate the Establishment Clause of the First Amendment?

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Secondary Authority:

Federal Rules of Civil Procedure, Rule 24 4

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CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

STATUTE INVOLVED

The statute here involved is an integral part of the Minnesota State income tax laws set forth in Minnesota Statutes, Chapter 290. The law allows certain deductions from gross income to be made in determining net income which is then subject to tax. One of those deductions is found at Minnesota Statutes §290.09, Subd. 22. It allows a deduction for:

> Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363.[2] As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used

[1] 42 U.S.C.A. §2000c *et seq.*

[2] The Minnesota Department of Human Rights Act.

in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

STATEMENT OF THE CASE

This is an action challenging a Minnesota state income tax provision, Minn. Stat. §290.09, Subd. 22, as being in contravention of the First Amendment, as applied to the states through the Fourteenth Amendment.

The petitioners are citizens and taxpayers of Minnesota who are interested in maintaining the separation of church and state.

Respondent Clyde E. Allen, Jr. is sued in his capacity as Commissioner of the Department of Revenue of Minnesota.

Respondent Brenda B. Becker is a single parent with children attending St. Paul Academy, a nonpublic school with no religious affiliation. Respondents Richard and Marjorie Hollingsworth are parents of children attending Central Lutheran School and Concordia Academy, both in St. Paul, Minnesota. Respondents Roger and Dorothy DeHaan[3] are parents of a child attending Hollandale Christian School, Hollandale, Minnesota. These schools are religiously affiliated.[4]

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[3] The remaining respondents, as taxpayers and parents, are separately represented by Timothy P. Quinn, Esq.

[4] The term "church-sponsored schools" appears to come from *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 476 (1973). Respondents would prefer the term "nonpublic" schools in distinction to public schools. A further distinction can then be made between nonpublic schools which have or do not have any religious affiliation.

These respondents are Minnesota residents and taxpayers who have claimed the deduction at issue here on their Minnesota tax returns for a number of years, and intend to claim it so long as they have eligible dependents.[5] These respondents thus have a personal stake in the outcome of this litigation.[6]

The challenged statute authorizes Minnesota taxpayers to claim income tax deductions for tuition, textbooks and transportation expenditures made on behalf of their dependents attending certain qualified elementary or secondary schools. This includes *both* public and nonpublic schools.

The statute was first enacted in 1955; it simply granted a deduction for tuition and transportation expenses paid to others, to a maximum of $200. 1955 Minn. Laws, Ch. 741. The statute was in effect for 1955 and many subsequent years without constitutional challenge. In 1976 the statute was amended to allow the deduction for up to $500 for expenses for children in kindergarten through grade 6, and up to $700 for expenses for children in grade 7 through grade 12. Also qualifying for the deduction was an expenditure for secular textbooks. In addition, "school" was defined to include only those nonprofit schools where a child could fulfill compulsory attendance requirements and where state and federal civil rights laws were observed. 1976 Minn. Laws Ch. 37. The statute was amended a third time in 1978 to exclude expenses relating to "extracurricular activities".[7] 1978 Minn. Laws Ch. 766.

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[5] The state income tax forms for 1980 and 1978 are found at Petitioners' Brief, Appendix A.

[6] The two groups of respondents were accorded the right to intervene under Rule 24, Federal Rules of Civil Procedure.

[7] However, certain types of extracurricular activities were by interpretation made subject to the deduction, where the school awarded credit for participation. See JA 10-12 and 23-24, the latter relating to driver's training expenses.

The statute provides a deduction similar to many other deductions allowed by state or federal law. The mechanics of the deduction can be briefly stated as follows:

1. The taxpayer must pay others[8] for the tuition, transportation or textbook expenses in the calendar year for which he is filing the return.

2. The deduction is limited to $500 or $700, depending on the grade level of the dependent.

3. The taxpayer must itemize deductions. If he claims the "standard deduction" which is ten percent of adjusted gross income under Minnesota law, he is not eligible for this or any other deduction, except for the federal income tax deduction.[9]

4. He must have a taxable net income, considering all other allowable deductions.

5. The deduction and resulting net income subject to tax must cause his income to be in a lower tax table or a lower bracket set forth in Minn. Stat. §290.06, Subd. 2(c). The tax tables are based on $50 increments while the schedule of rates for higher income taxpayers (taxable net income in excess of $20,000), is based on a percentage formula.[10]

Like any other deduction, the benefit to the taxpayer is a function of his taxable income and the rate of taxation. Assuming a taxpayer is subject to the maximum rate of tax under Minnesota law (16%), the maximum benefit to the tax-

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[8] "Others" could include the school as to tuition or rental of equipment, or a public transportation system as to transportation. See Memorandum of Caulfield, JA 17-22.

[9] Minn. Stat. §290.09, Subd. 15 (1980).

[10] For taxable years after December 31, 1980, the taxable net income bracket, the standard deduction and the personal credit amounts are adjusted for inflation, in accordance with the formula set forth at Minn. Stat. §290.06, Subd. 2(d).

payer for a $700 deduction would also be 16% or $112.00. For example:

Taxable Net Income Without this Deduction	Taxable Net Income Claiming Maximum $700 Deduction
$30,000	$ 29,300
X .16	X .16
Tax = 4,800	Tax = 4,688
Difference = $112.00	

If the taxable income is lower, the tax rates are lower and the deduction is diminished correspondingly.

For example, a person with a taxable net income of $13,000 and claiming a deduction of $300 would realize a benefit of $42. That person is taxed at a 14% rate:

Taxable net income Without Claiming This Deduction	Taxable net income Claiming $300 Deduction
$13,000	$12,700
X .14	X .14
Tax = $ 1,820	$ 1,778
Difference = $42.00	

The statute thus operates as a true tax deduction: it is limited to actual expenditures; it does not provide direct financial aid to the taxpayer; it does not directly subsidize any activity and it does not operate as a credit against the tax due.[11] The fact

[11] A tax credit would provide more direct benefits in that the taxpayer would receive a dollar-for-dollar reduction in his taxes due. Also, many credit-type statutes have a mechanism for a direct grant or payment in the absence of taxable income.

that this statute operates as a "true tax deduction" was quite important in the thinking of the lower district court. *See, Mueller v. Allen*, 514 F.Supp. 998, 1002 (D. Minn. 1981).

The deduction is allowable to *all* taxpayers who have dependents in elementary or secondary schools, public or nonpublic, religiously affiliated or not. Of particular importance constitutionally are the benefits available to *public* school parents. It is true that the public school districts cannot charge tuition in the ordinary sense for a student residing in the district.[12] They can and do charge tuition, however, when a child from another district is educated in their district,[13] for special tutoring, driver's education, and summer school tuition. The affidavit of Ronald Moir, a state employee, indicates that in the school year 1978-1979, the state received $2,005,142 in tuition payments from public school parents. (JA 36-39). This must be considered a conservative figure in that summer school driver's education is omitted. In addition, expenditures made by public school parents for education outside the state or for special classes or summer school at non-public schools are *not* included. Petitioners denigrate the importance of this figure by saying this is an *average* of $2.49 per public school student. (Brief, p. 9). Petitioners arrive at $2.49 by dividing $2,005,142 by the *total* number of public school students in the state, or 815,155.[14] Obviously this is faulty reasoning and once again shows the facile use of statistics by petitioner. The number of public

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[12] Minn. Stat. §120.06.

[13] Minn. Stat. §123.39, Subd. 5. Footnote 4 of Petitioners' brief seems to question the payment of tuition by parents for inter-district education. The Moir affidavit, however, is simply a recitation of data found in the accounting code for Minnesota public school districts.

[14] JA 26.

school parents actually claiming the deduction is not known, but certainly an *average* figure is not representative of the size of deductions actually taken. (Petitioners are also in error by *presuming* that each of the 88,000 non-public students are charged tuition by their schools. (Brief 7-9). There is no record support for this presumption; in fact, many non-public schools do not charge *any* tuition.)

Further, public school parents can and do pay a variety of fees to the public school districts. The detailed list is found at Minn. Stat. §120.73. In 1978-1979, payments of fees amounted to $907,000.[15] Representative fees include those for physical education and athletic equipment, rental fees for musical instruments, and items such as those used in home economics class or shop class. In turn, most of these fees are subject to the deduction. Further the State Board of Education has the authority to specify further authorized fees by using its rule-making authority.[16] It seems only logical that the Board of Education will seek to enlarge the fees payable by parents of public school students as a means to alleviate the fiscal difficulties facing this state in coming years.

Tax benefits are obviously available to nonpublic school parents under this statute. There were 88,524 children enrolled in nonpublic schools in Minnesota for the school year 1978-79, and of these 4,281 were enrolled in nonpublic, nonsectarian schools, while 85,243 were enrolled in nonpublic schools with some type of religious affiliation.[17]

The record does not reveal, however, the separate number of public or nonpublic parents claiming the deduction, the amount of deduction claimed by the two parent classes or

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[15] JA 37-38. See Memoranda of G. Caulfield, JA 17-24.

[16] Minn. Stat. §120.75, Subd. 2.

[17] JA 25-27.

whether the deductions are for tuition, textbooks or transportation. The Revenue Department simply does not maintain that type of data and could not provide it short of an audit of all taxpayer returns claiming the deduction. See, JA 2-9. Petitioners' extrapolation of data found at Appendix B is therefore interesting but remains purely conjectural.

There is evidence in the record that for the year 1978, the state abstained from taxing income in the amount of $2.4 million.[18]

The constitutionality of this statute was first decided in 1978, when a Three-Judge Federal Court upheld the statute. *Minnesota Civil Liberties Union v. Roemer*, 452 F.Supp. 1316 (D. Minn. 1978). No appeal was taken from that decision. The present action was commenced in 1980 and again the statute was upheld by decision of Judge Renner who granted Summary Judgment for the defendants. *Mueller v. Allen, supra.* On appeal the statute was upheld a third time. *Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982).

This Court granted petitioners' Writ of Certiorari on October 4, 1982.

SUMMARY OF ARGUMENT

The statute here provides a modest form of tax relief to *all* Minnesota taxpayers who have dependents in qualifying elementary and secondary schools. This includes all the public schools, together with non-public schools, some of which have religious affiliation. The statute provides the relief in the form of a tax deduction on the person's individual tax return in the actual amount of the school expenses, but not to exceed $500 for grades Kindergarten through 6 and not to exceed $700 for grades 7 through 12.

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[18] JA 5.

The statute has been in effect since 1955, but was not challenged until amended to provide larger deductions, which occurred in 1976. After amendment, the statute has been upheld three times, in 1978 by a Three-Judge Federal Court, in 1981 by Judge Renner, and in 1982 by the 8th Circuit Court of Appeals. The statute was challenged on the basis of the Establishment Clause.

The standard to be applied is the now familiar three-pronged test: The statute must have a secular legislative purpose, must not have the principal or primary effect of advancing religion, and must not foster an excessive entanglement with religion.

The standard must remain flexible, dependent upon the facts and circumstances of the case. Further, the standard is not an end in itself, but simply a means of achieving neutrality, namely, a neutral course between the absolutes phrased in the two religion clauses of the First Amendment.

1. The statute has a secular purpose in that it recognizes that the primary obligation for education belongs to the parents, not to the state. It recognizes that obligation by according a small tax benefit to the parent for his or her dependents' school expenses. Thus the statute assists taxpayers by helping provide a safe, effective, and diverse educational environment, and enhancing the quality of education in both public and nonpublic schools. The title of the Act is secular and its purposes are clearly secular.

2. The statute does not have the principal or primary effect of advancing religion. The statute advances *education* of the youth of Minnesota, not religion.

The case law clearly recognizes that *indirect* benefits may be accorded to churches or religious schools without causing a violation of the Establishment Clause. The benefits to religious schools here are extremely remote and indirect.

The real beneficiaries of the Act are parents and children, not schools. While this is not the controlling principle, both *Everson* and *Allen* have pointed out the significance of assistance going to parents and children.

The class benefited is broad: all taxpayers with children in elementary or secondary schools who incur expenses in the nature of tuition, transportation and secular textbooks. The breadth of the class makes the statute similar to *Everson*, *Allen* and *Walz* and distinguishes this statute from those providing benefits only to non-public school pupils or parents. Public school parents have been eligible for significant deductions under the Act. The evidence shows that for one year, public school parents paid over $2,000,000 in various types of tuition to the public schools and over $900,000 in "user fees". Recent data shows that public school parents must be taking advantage of the Act, in that 68% of the deductions were for less than $400, which is less than the average tuition in non-public schools. Thus the benefited class is not mythical; it is broad based.

The statute does not cause a sponsorship of religious activity. There is no incentive or reward for sending a child to a non-public school. The statute merely accords an indirect benefit, neutrally available to all, limited to the taxpayers' actual expenses, and dependent upon his income and tax rate. The statute is thus similar to other forms of "true deductions" available under both state and federal laws. It is analogous to the deduction for charitable contributions in both federal and state tax laws.

Nyquist can thus be distinguished on two bases: (a) the tax credit statute there operated more as an incentive rather than a true deduction; (b) the tax benefits there were limited to private school parents, as opposed to the broad class of parents

with dependents in both public and non-public schools benefited under the Minnesota law.

3. The statute does not foster an excessive entanglement with religion. There is no new church-state relationship created. The taxpayer is subject to audit and must prove his expenses, similar to any other deduction. Further, no strife or division has been created by this law, in effect since 1955, and none should be presumed.

The statute is valid in all respects.

ARGUMENT

THE STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Background.

This case concerns education and specifically the education of students in the grade and secondary levels. Petitioners allege that the state cannot provide indirect assistance to the parents of these children to help them meet educational expenses. Petitioners would appear to concede the validity of the statute as to public school parents and as to nonpublic school parents with children in nonsectarian schools. Petitioners' main argument is that the benefits are "skewed" in favor of parents with children in sectarian schools, thereby allegedly causing a violation of the Establishment Clause.

It is interesting to note that the controversy over "sectarian schools" only began in 1947 when this Court decided *Everson v. Board of Education*, 330 U.S. 1 (1947). There seemed to be little controversy in 1925 when the Court decided that Oregon could not mandate the attendance of children only in the public school system of that state. *Pierce v. Society of Sisters*, 268

U.S. 510 (1925). And in 1930 the Court held in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930) that the state could purchase secular textbooks and supply them free to all the school children in the state. Although the decision was based on a property theory, the Court recognized that it was the state and education that benefited, not the nonpublic schools.

> The Legislation does not segregate private schools or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded. 281 U.S. at 375.

Further, the "controversy" over nonpublic schools that have some form of religious affiliation does not extend to other institutions which perform a dual function, both secular and sectarian. Thus the Court had little difficulty in sustaining a federal grant for construction of a public ward to be administered as part of a hospital under the control of a religious order in *Bradfield v. Roberts*, 175 U.S. 291 (1899).[19] In more recent times, hospitals owned and administered by religious bodies and religious orders have received massive grants for construction under the Hill-Burton Act, 42 U.S.C. 291, *et seq.*, without any serious question raised as to the constitutionality of the Act. The same is true for orphanages, children's homes and many other institutions that perform both secular and sectarian activities.

Education, however, appears to be on a different plane, even though the reasons for the distinction are not entirely clear.

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[19] This appears to be the first case interpreting the Establishment Clause in regard to governmental assistance programs.

How, then, should the Establishment Clause be interpreted in regard to a statute providing benefits to parents of children attending both public and nonpublic schools, some with religious affiliation and some not? Is it true, as the Minnesota Supreme Court intimated, in *Minnesota Civil Liberties Union v. State of Minnesota*, 302 Minn. 216, 224 N.W.2d 344 (1974) that the test has become one of "any effects" instead of the "principal and primary effect"? Respondents think not. On the contrary, respondents assert that a state program of assistance to parents of all school children is valid under the Establishment Clause, as all the lower federal courts decided in regard to this Minnesota law.

B. The Test Must Be Flexible.

The Court has said time and again that a flexible approach must be taken to interpretation of the Establishment Clause. The most recent expression is found in *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980):

> What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Chief Justice Burger expressed the same principle well in *Tilton v. Richardson*, 403 U.S. 672, 677-678 (1971):

> Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors[20] are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental actions challenged as violative of the Establishment Clause. There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. . . . candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Flexibility is not, however, an end in itself; it is a legitimate means to steer the Court between the Establishment Clause and the Free Exercise Clause, both of which are phrased in absolute terms. The absolutes are a governmentally established religion and a governmental interference with religion. However,

> Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benev-

[20] Identified as "sponsorship, financial support, and active involvement of the sovereign in religious activity". *Id.*, 403 U.S. at 677.

olent neutrality which will permit religious exercise to exist without sponsorship and without interference. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

C. The Test Must Achieve Neutrality.

The Court has indicated many times that the desired result is a position of *neutrality*. *See, Board of Education v. Allen*, 392 U.S. 236, 242 (1968); *Roemer v. Board of Public Works*, 426 U.S. 736, 746-747 (1976). Similar to flexibility, however, neutrality is not an end or a virtue in itself. It is a desired result because it allows religious convictions to exist on their own merits, that is, without either interference or sponsorship from the government. This principle is especially important in a tax case because an exemption from taxation is the obvious legislative choice by which to achieve neutrality. As stated in *Walz v. Tax Commission, supra*,

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. 397 U.S. at 672.

The desired neutrality also serves another very clear purpose: it avoids active involvement of the sovereign in religious matters which would cause strife and division. In short, government avoids strife by remaining neutral in religious matters. This appears to be the basis for the "entanglement" aspect of the test first introduced in *Walz v. Tax Commission, supra*.

D. The Test Is Now Well Accepted.

The Court has fashioned a three-part test in this area, which is now well-accepted. It was first fully expressed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed. 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 674, 25 L. Ed. 2d at 704.[21] 403 U.S. at 612-613.

1. The statute has a valid secular legislative purpose.

Petitioners' argument on this point (Brief, 67-76) is indeed curious in that they raised the issue in their pleadings, but declined to brief or argue this part of the test before the Trial Court. *See, Mueller v. Allen, supra*, 514 F. Supp. at 1001. The issue was raised before the Eighth Circuit, but that Court quickly dispatched with the contentions of the petitioners. *Mueller v. Allen, supra*, 676 F.2d at 1198. Despite this, respondents will address the issue here, largely because of the novel arguments raised by petitioners.

The secular purpose test was analyzed in greatest detail in *McGowan v. Maryland*, 366 U.S. 420 (1961), dealing with a Sunday closing law. The Court held the statute had a secular legislative purpose to provide one day free from commercial activity, allowing only activities which are necessary or recreational. The Court placed emphasis on the title of the Act,

[21] The first two aspects of the test, while mentioned in prior case law, were first adopted in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

the presumption of constitutionality, and the reason behind the legislation.

The title of the Act[22] here is straightforward: "An act relating to taxation; increasing the income tax deduction for dependents' school expenses; amending Minnesota Statutes 1974, Section 290.09, Subdivision 22." There is clearly no reference to religion, religiously affiliated schools, or worship in the title. Instead, the legislature is simply providing a tax deduction for school expenses incurred by the taxpayer, without regard to *where* those expenses are incurred.

The purpose of the statute is simply to provide all taxpayers (with school age dependents) a benefit which will operate to enhance the quality of education in both public and nonpublic schools. The statute assists taxpayers by helping provide a safe, effective, and diverse educational environment. Similar purposes have been accepted in other Establishment Clause cases where education of youth was pivotal to the Act, even where the statute was declared invalid on other grounds. *See, Meek v. Pittenger*, 421 U.S. 349, 368 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

In *Wolman v. Walter*, 433 U.S. 229, 262 (1977), Justice Powell in a separate opinion stated the classic interest of the state in the education of its youth:

> The state has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

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[22] 1976 Minn. Laws, Ch. 37. The title of the original legislation was simply "An act relating to taxes on and measured by net income . . ." 1955 Minn. Laws, Ch. 741.

The interest of the Minnesota legislature is identical. In its Constitution, Article XIII, Sec. 1, Minnesota has recognized the high priority accorded education, and the reasons therefor:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough an efficient system of public schools throughout the state.

In accord with *Pierce v. Society of Sisters, supra*, the legislature has also recognized the role of non-public education in the state. While no direct financial subsidy is accorded to non-public schools,[23] various forms of assistance are accorded to children and parents.[24]

The legislature has also recognized that the prevailing *obligation* for education of youth lies not with the state, but with the parents. The state may facilitate education and provide a system of schools, but the obligation is on the parent to see to his child's education. That concept is clearly stated in the compulsory attendance law, where criminal penalties for non-attendance can be invoked against the parent or guardian. Minn. Stat. §120.12.

Another dimension is added in regard to religiously affiliated schools. The Free Exercise Clause may shield a parent from non-compliance with the compulsory attendance law, if

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[23] Direct subsidy of sectarian schools is prohibited by Article XIII, Sec. 2 of the Minnesota Constitution.

[24] *See*, e.g., Minn. Stat. §123.931-947, dealing with educational aids for nonpublic school children.

the attendance requirement is contrary to the parents' religious beliefs, and the child receives an adequate education through the system preferred by the parents. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court there recognized the primacy of the parental obligation.

> . . . This case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.
>
> 406 U.S. at 232.

The statute here has a secular legislative purpose precisely because it addresses all of these important societal concerns. It fosters the education of youth, it helps to provide a safe, effective and varied educational environment, and it recognizes the primary role of the parent in the educational process.

Petitioners' arguments on this point do not ring true. They seek to confuse the secular purpose test with the primary effect test by arguing that the immediate purpose of the Act is to provide state aid to religious institutions. (Brief, 67-69). This statute clearly does not seek to provide state aid to religious institutions.[25] It provides assistance to parents so that they may accomplish the ultimate purpose of educating their children.

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[25] Even direct assistance to religious institutions may not violate the Establishment Clause, so long as the funds are used only for secular purposes. *Roemer v. Board of Public Works, supra*; *Tilton v. Richardson, supra.*

Next, petitioners engage in a lengthy discussion of the chronology of adoption of this law (Brief, 70-76), in an attempt to show it was motivated to assist religious schools. Petitioners are in error on a number of points[26] but of more concern is the veiled argument that certain groups apparently should not have access to the legislature to redress their grievances. That certainly is not the law. In addition, the Court has recognized that there is no "bright line guidance" in Establishment Clause cases,[27] which means that interested groups and state legislators must do a certain amount of groping to locate the proper line. This was well recognized in *Committee for Public Education v. Regan, supra.* The case involved a successful attempt to fashion a New York statute authorizing the use of public funds to reimburse nonpublic schools for performing certain testing and reporting services mandated by state law. The New York legislature acted in response to this Court's decision in *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) which voided an earlier statute. No fault can be found for attempting to draft and enact a valid statute!

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[26] The most glaring error is their failure to recognize that the prior tax credit statute was voided by the Minnesota Supreme Court in acquiescence to *Comm. for Public Ed. & Rel. Lib. v. Nyquist, supra,* based solely on the principal and primary effect, not the secular purpose test. In fact, the Court spoke eloquently of the secular purpose of that law.

> Suffice to say, it should be a proper legislative goal to provide equal opportunity to all children to have available to them the resources of all public school facilities and to avoid the denial of any of these services to them merely on the fact that their parents, in the exercise and control of their children, and in the exercise of their freedom of choice and freedom of religion, have chosen to have their children attend classes at a nonpublic school. *MCLU v. State, supra,* 302 Minn. at 234.

[27] *Comm. for Pub. Ed. and Rel. Lib. v. Nyquist, supra,* 413 U.S. 756, at 761, Footnote 5.

This statute has a clear secular purpose. It is addressing one of the gravest concerns of society—the education of our youth.

2. The statute does not have the principal or primary effect of advancing religion.

As discussed before, this aspect of the test attempts to steer a neutral course between the two Religion Clauses of the First Amendment. The major controversy has been to what extent may churches or religious institutions be benefited *indirectly* by the legislation.

It has been repeatedly stated that some indirect benefits may be accorded to religious entities without causing a violation of the Establishment Clause. This was recognized and acknowledged prior to *Nyquist* in *Everson v. Board of Education, supra, Walz v. Tax Commission, supra,* and *Tilton v. Richardson, supra.*

Some have read *Nyquist* as imposing an "any effects" test rather than a "primary effects" test. However, post-*Nyquist* decisions have repeatedly emphasized the same principle: a program which in some indirect manner aids a religiously affiliated school or a church is not necessarily invalid. Thus in *Roemer v. Board of Public Works, supra,* the Court indicated that religious institutions need not be "quarantined" from public benefits that are neutrally available to all.

> *Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity. 426 U.S. at 747.

And in *Wolman v. Walter, supra,* Mr. Justice Powell, the author of *Nyquist,* wrote a separate opinion underscoring this principle, rejecting a more literal reading of *Meek v. Pittenger, supra.*

> If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. . . . The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause.
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> 433 U.S. at 262.

More recently, the Court decided *Committee for Public Education v. Regan, supra,* and *Widmar v. Vincent,* 454 U.S. 263 (1981), the latter case upholding the use of meeting rooms at a secular university for religious groups.

If indirect aid is not an automatic violation of the Establishment Clause, where is the line to be drawn? Respondents submit that three elements of the statute must be examined: (1) Who is the immediate beneficiary of the statute; (2) What is the breadth of the class benefited and (3) Does the statute act affirmatively to encourage religious activity. No one of these elements alone will be determinative of constitutionality. Taken together, however, the statute will be valid if parents and children are the immediate beneficiaries, the class benefited is broad, and the statute does not affirmatively encourage religious activity.

a. Parents and children are the immediate beneficiaries.

The statute here clearly benefits parents and children, rather than institutions. This has been viewed as an important element in a number of cases. Thus in *Everson v. Board of Education, supra,* the Court said:

> The state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more

> than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.
>
> 330 U.S. at 18.

And in *Board of Education v. Allen, supra*, the Court stressed the same principle:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.
>
> 392 U.S. at 243-244.

If there is direct payment to the non-public school, instead of to parents, the statute will be either invalid or at least subject to extreme scrutiny, under the entanglement test. Thus in *Lemon v. Kurtzman, supra*, the Court noted:

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.
>
> 403 U.S. at 621.

This principle also allowed the Court to rather summarily deal with the "maintenance and repair" part of the New York statute at issue in *Nyquist*, especially where there was no articulated secular restrictions.

Thus lack of direct receipt of funds by religious institutions is important, though certainly not controlling either way. The Court recently upheld another New York statute, even though it entailed *direct* payment of funds to religiously affiliated non-public schools. *Committee for Public Education v. Regan, supra.*

Some might refer to this as the "child benefit" theory. While it certainly has that aspect of immediate benefit to the parent and child, respondents would view it more as a "community benefit" theory. As developed in the introductory sections of this brief, it is the community and the state as a whole that benefits from an educated citizenry. Both the immediate parent-child benefits and the long range community benefits are important.

b. The benefited class is broad including both public and non-public school parents.

Both *Everson* and *Allen* stressed the fact that the benefits of transportation and textbook aid there provided were available to *all* parents and children, not just those attending non-public schools. Other courts have looked to the class benefited and if it consists only of non-public school children and parents, the statute is suspect and will usually be ruled invalid. *See, Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. at 783, footnote 38; *Minnesota Civil Liberties Union v. State of Minnesota, supra*; *Public Funds for Public Schools v. Marburger,* 358 F.Supp. 38 (D.N.J. 1973) aff'd. mem., 417 U.S. 961 (1974).

The breadth analysis was of the utmost importance in *Walz v. Tax Commission, supra.* The statute,

> . . . has not singled out one particular church or religious group or even churches as such; rather, it has

> granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.
>
> 397 U.S. at 673.[28]

The statute here is clearly drawn as broad as possible; all taxpayers with children in elementary or secondary schools. No special or arbitrary class is created. The statute is totally neutral on its face.

Much of petitioners' argument is premised on disbelief in facial neutrality; they assert the benefited class is predominantly sectarian parents and sectarian schools. Petitioners thus continue to dispute, as a factual matter, the findings of both lower courts that the statute extends substantial benefits to the entire broad class of taxpayers. This is indeed surprising in light of the fact that the lower court concluded petitioners' statistical analysis lacks "credibility by reason of omissions of serious significance". *Mueller v. Allen, supra*, 514 F.Supp. at 1003; further, the appeal court labeled petitioners' attempt at a de facto analysis as "uninformative". *Mueller v. Allen, supra*, 676 F.2d at 1200.

However, further analysis is necessary. First, petitioners' attempt to measure validity in terms of who actually *receives* benefits as contrasted with who is *eligible* for benefits, is misplaced. This information is simply not available and thus hypo-

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[28] The size and nature of the class, following *Walz*, has been viewed of great importance in cases of direct aid to facilities of higher education. *See, Tilton v. Richardson, supra*, and *Hunt v. McNair*, 413 U.S. 734 (1973). *See*, also, *Widmar v. Vincent, supra*, where the provision of benefits to a broad class of university students was "an important index of secular effect".

thetical conclusions are pure speculation. More importantly, this Court has engaged in a close examination of the benefited class only when the legislation was narrowly drawn and therefore suspect. In such cases further analysis is keyed to whether the special class is largely sectarian. Thus, in *Everson, Allen* and *Walz*, no inquiry is made into the percentage of recipients who attend sectarian schools, or the percentage of property owned by churches. Such analysis is irrelevant given the breadth of the class. On the other hand, a statistical analysis was important in *Nyquist* and *Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3rd Cir.), *aff'd. mem.*, 442 U.S. 907 (1979), precisely because the class consisted of only nonpublic school parents; the Court was forced to inquire into the sectarian element in order to test the "special legislation" at hand.

Second, even if examined, petitioners' statistical analysis is not convincing. They ignore the fact that over $2,000,000 was paid by *public* school parents for tuition. They continue to omit deductions available for summer school drivers' education, education outside the state, or for special classes or summer school paid to non-public schools. In addition, petitioners have not given recognition to the over $900,000 paid in "special fees" to districts by public school parents.

Recent data has been supplied to the Court in the brief of respondent Clyde Allen which is highly relevant here. *See* Appendix A and B of that brief. This shows the distribution of dependent expenses in $100 brackets, the number of returns and the number of dependents for the two years examined. For 1980, for example, about 30,000 returns claimed less than $100, 15,000 claimed less than $200, 8,500 returns claimed less than $300, and 5,100 returns claimed less than $400. Thus about 68% (58,000 out of 85,000 returns) claimed deductions

of less than $400. A large bulk of these returns must pertain to *public* school expenses in that the average sectarian tuition charge for 1979 was $420, by petitioners' own figures. (Brief, 8).

Thus, petitioners' use of statistics is not convincing. Both facially and as applied, this statute makes modest tax benefits available to the entire class of taxpayers with dependents, regardless of where they might be educated. The broad class benefited is of great importance in determining the neutrality of the statute.

c. The statute does not affirmatively encourage religious activity; there is no sponsorship of religion.

As discussed above, indirect aid to religious institutions is permissible while direct aid is either outright invalid or highly suspect. Further analysis is required, however, to determine if the indirect aid is possible or constitutes an active encouragement to participate in religious life. This analysis is necessary because *Nyquist* teaches us that if the program operates as an *incentive* to send children to religiously affiliated schools, there can be a violation of the Establishment Clause. *Nyquist*, 413 U.S. at 786.

The best discussion of this issue is found in *Walz v. Tax Commission, supra*, 397 U.S. at 675-676.

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll". There is no genuine nexus between tax exemption and establishment of religion.

Thus a tax exemption is not the same as a grant of money, even though it indirectly confers an economic benefit. The benefit is conferred passively and has the distinct advantage of maintaining the separation of church and state.

The "maintenance and repair" program struck down in *Nyquist* was clearly an affirmative grant from the state to the nonpublic schools and its effect was clearly to "subsidize and advance the religious mission of sectarian schools". 413 U.S. at 779. In addition, the "tuition reimbursement" program was held to be an affirmative grant to low-income parents; it had the same infirmities as the maintenance and repair program and the mere fact that the grant was directed to the parents rather than the school was not enough to validate it.

The third aspect of *Nyquist*, the tuition credit program, is much closer to the instant statute. The Court distinguished *Walz v. Tax Commission, supra*, indicating that a tax exemption tends to complement and reinforce the separation of church and state, insulating one from the other. And, the exemption of property there involved a broad class of property owners. The Court found both of these aspects absent from the tuition program and hence *Walz* was not controlling.

Respondents have already set forth their views on the benefited class. It is broad and therefore more akin to *Walz*, whereas the statute in *Nyquist* benefited *only* non-public school parents.

The remaining point is whether the Minnesota statute is closer to a tax exemption than to the tax credit or whatever label is to be accorded the third program in *Nyquist*.

First, it is clear that the Minnesota statute operates as a true tax deduction, as factually determined by the lower courts. It is limited to actual expenditures. It does not operate as a credit against the tax due. It does not provide direct financial

aid to the taxpayer. And, the amount of the benefit is solely the function of the rate of tax and the amount of taxable income. The Court in *Nyquist* made specific reference to the fact that the statute there did *not* have the elements of a genuine tax deduction. 413 U.S. at 790, N.49. The Court explained some of the differences between a true tax deduction and the disallowed statute:

> The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families.
>
> 413 U.S. at 790.

Under the Minnesota Statute, however, the amount of the deduction is limited to the expenses incurred by the parent, subject to the $500 or $700 maximum. There is no predetermined benefit accorded the parent. The value of the deduction is based solely on the amount of the deduction, the rate of tax and the taxable income of the taxpayer.[29]

Second, there is no logical distinction between a tax exemption and a tax deduction. The mechanics may be different, but the end result is exactly the same. The state abstains from taxing property or income in a certain amount in both instances. The deduction also has the same effect as in *Walz*, namely, insulating the affairs of church and state from each other.

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[29] As discussed in the Statement of the Case, the maximum any taxpayer could possibly receive is $112 per dependent.

Both lower courts compared the deduction here to the deduction for contributions under Internal Revenue Code, §170. The comparison is indeed apt. Both operate mechanically the same way. Both include a large class and are therefore facially neutral. Both provide only indirect assistance to sectarian institutions. In fact, the benefits to churches and sectarian institutions is vastly greater under the contribution deduction than the instant statute. Entire churches and religious institutions depend solely on charitable contributions for their existence. The constitutional significance here is that all of the contributed monies under §170 are used for sectarian purposes. There has never been any attempt to separate the secular from the sectarian since the reason for the contribution is simply to support church activities. Still, no Court has held or intimated that the charitable contribution deduction equals the sponsorship of religion.

The Minnesota statute likewise does not attempt to separate that portion of tuition related to secular as compared to sectarian. Such separation is necessary for a direct assistance program, but is not necessary for an indirect program that aids the parent with his primary obligation of education. In addition, the amount of the benefit cannot exceed the maximum tax rate (16%) multiplied by the deduction taken per child. Thus even with a maximum $700 deduction, and a taxpayer in the highest bracket, only 16% of that will be exempted from tax. Religiously affiliated schools are performing both a secular and sectarian function. *Board of Education v. Allen, supra.* They are providing a secular education comparable to that of the public schools, plus a religious education in accord with their system of beliefs. The deduction, even at maximum levels, could not possibly be attributed to the sectarian education provided in those schools which are religiously affiliated.

Petitioners attempt to distinguish the deduction here from charitable deductions by means of a "user fee" argument. Brief, 20-32. The distinction makes no sense, either factually or from a constitutional viewpoint. First, most taxpayers do get some services or direct "benefit" from a charitable contribution. For example, they have access to and use a museum, library, hospital, university or other institution they wish to assist. When they contribute to their church, they receive in return the benefit of the church's services, the programs offered, the counselling of the minister and the use of the very building itself. While a few charitable contributions may lack any use aspect by the donor, the vast majority entail some benefit to the donor.

Secondly, there are many deductions and credits under state and federal tax laws which involve a degree of use by the taxpayer. For example, Minnesota law provides a deduction for expenses incurred in adopting a child. These include agency and social service fees, attorney's fees and other expenses related to the adoption process. Minn. Stat. §290.09, Subd. 27. The taxpayer clearly gets a use and benefit from the agency and attorney that perform the services. In addition, most of the social service agencies have a religious affiliation, such as Lutheran Social Service, Catholic Charities, etc. Another example is the child and dependent care credit available under Minn. Stat. §290.067, and Internal Revenue Code, §44A. The taxpayer obviously gets a use or benefit. He or she pays another to provide child care. In addition, many child and day care centers are run by or affiliated with churches. Does it constitute the establishment of religion for the state to grant these types of deductions or credits?

Lastly, petitioners argue that the state and federal taxing authorities will disallow a charitable contribution if it in fact

is payment for tuition at a sectarian school. *Winters v. Commissioner*, 468 F.2d 778 (2nd Cir. 1972); *Gotlieb v. Commissioner of Taxation*, 310 Minn. 62, 245 N.W.2d 244 (1976). The only thing those cases hold is that a *charitable* contribution will not be allowed under §170 because the taxpayer is receiving something in value equal to the contribution. Such a result does not invalidate a different deduction, and as determined above, many deductions and credits contain a benefit or use on the part of the taxpayer. In addition, petitioners have failed to demonstrate why these cases have any constitutional significance. They do not; they are simply cases construing the validity of contributions under that section of the code.

Respondents assert that the deduction here is valid. The deduction is passive, indirect and remote. It does not amount to sponsorship of religion. In the words of the appeal court:

> . . . We conclude . . . that the state, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the state has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school. *Mueller v. Allen, supra*, 676 F.2d at 1205.

3. The statute does not foster an excessive governmental entanglement with religion.

The third aspect of the test examines both *administrative* relationships between church and state and the possibility of *strife* and division created by the law. *Walz v. Tax Commission, supra*; *Lemon v. Kurtzman, supra.*

a. There are no excessive administrative relationships created.

The statute does not create a new church-state relationship, but simply uses the mechanism of the state tax laws, wherein the relationship is present only between the state and the taxpayer. The taxpayer claims the deduction and it is he who must justify the deduction on audit. Even in that case, the only involvement would be to examine records of the taxpayer to make sure they support the claimed deduction. Thus he may have to supply cancelled checks, receipts or bills to verify the expenses. This is no different than any other deduction claimed by a taxpayer under federal or state law. Respondents cannot even conceive of a situation where the records of the school would have to be examined, except possibly to build a fraud case against a taxpayer who falsified his records. That obviously would be a very unusual situation. Even if it did occur, the examination of the school records would be a very straightforward process. It would also be a nonrecurring process. The recent case of *Committee for Public Education and Religious Liberty v. Regan, supra*, teaches us that an examination of the books and records of a sectarian school does not cause entanglement where the reimbursement process is straightforward and routine.

It would appear obvious that this statute, similar to other deduction-type law, does not entangle the church and state in each other's affairs.

b. No strife or division is created by the statute.

In *Walz v. Tax Commission, supra*, the Court placed great emphasis on the history of the tax exemption for real property, its acceptance by the people, and the lack of any strife or division created by the law. While the history is not so significant, the basic statute here has been in effect since 1955. No division along religious lines has occurred, no political wars and no evidence of strife is present in the community. Further, there is no need for annual appropriations to fund the bill. It is an integral part of the tax laws which needs no funding because of the abstention from tax created. Petitioners have offered no evidence in support of their entanglement theory. The words of Justice White in *Committee for Public Education and Religious Liberty v. Regan, supra*, 444 U.S. at 660-661, seem appropriate:

> On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.

Respondents submit that the statute does not create entanglement, much less any "excessive entanglement".

CONCLUSION

For all of the varied reasons asserted above, the lower court should be upheld. The statute is constitutional.

Respectfully submitted,

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